Supreme Court, U.S.
FILED

No. 98 965 DEC 28 1998

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

CARL FOXWORTH
Petitioner

v.

BUD RICHARDSON, Marion County Sheriff, in his individual capacity; JIM GRAHAM, Marion County Deputy Sheriff, in his individual capacity; VON TURBEVILLE, Marion County Deputy Sheriff, in his individual capacity,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

DOES AN ARRESTING OFFICER'S OMISSION OF MATERIAL FACTS FROM AN ARREST WARRANT AFFIDAVIT ESTABLISH A QUESTION OF FACT WHICH IS SUFFICIENT TO OVERCOME A MOTION FOR SUMMARY JUDGMENT IN A CASE ALLEGING AN ILLEGAL ARREST IN VIOLATION OF 42 U.S.C. SECTION 1983?

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Both of the lower courts have decided an important federal question that has not been settled by this Court, and in a way that conflicts with relevant decisions of this Court.

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- Opinion No. 97-1001 from the United States Court of Appeals for the Fourth Circuit decided March 16, 1998
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Petitioner, Carl Foxworth, asks this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The United States Court of Appeals for the Fourth Circuit affirmed the District Court's grant of Summary Judgment as to petitioner's claim of a deprivation of constitutional rights pursuant to 42 U.S.C. section 1983, as a result of an illegal arrest due to a lack of probable cause. The decision was unpublished, No. 97-1001, decided March 16, 1998. By Order filed June 29, 1998, the Court denied Petitioner's request for rehearing and suggestion for rehearing in banc.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on March 16, 1998. The Court of Appeals denied a timely petition for rehearing on June 29, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution states:

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not

> be violated, ***and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation***, and particularly describing the place to be searched, and the persons or things to be seized.

Emphasis added. 42 U.S.C. § 1983 states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the ***deprivation of any rights, privileges, or immunities secured by the Constitution*** and laws, shall be liable to the party injured in an action at law . . . .

Emphasis added. Further, F.R.C.P. 56 (c) is applicable to this action and in pertinent part states

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that ***there is no genuine issue as to any material fact*** and that the moving party is entitled to a judgment as a matter of law.

Emphasis added.

STATEMENT OF THE CASE

The question in this case is whether law enforcement officers' failure to disclose to the magistrate that this Petitioner was acting in defense of an elderly gentlemen in order to protect him from illegal and potentially deadly conduct being committed by teenage family members of the arresting officers, created a question of fact sufficient to defeat Respondent's motion for summary judgment in a 42 U.S.C § 1983 case.

Procedural History

On November 28, 1995, Carl Foxworth filed his complaint alleging a deprivation of constitutional rights, slander, conspiracy, abuse of process, and false imprisonment. The verified complaint alleged, *inter alia*, that he was wrongfully arrested on February 5, 1994, without probable cause and was the subject of a wrongful continuation of the criminal prosecution until the charges against him were ultimately dismissed by the Circuit Solicitor.

On September 23, 1996, the defendants filed a motion for summary judgment. On October 2, 1996, the Plaintiff filed his memorandum in opposition to the summary judgment. A hearing on the defendants' motion was held on October 11, 1996, and on October 25, 1996, the court issued its order granting summary judgment in favor of the defendants/respondents. The state law claims were dismissed without prejudice.

On October 28, 1996, judgment was entered in favor of the defendants. Plaintiff filed his Rule 59 motion with attachments on November 4, 1996, along with a supporting memorandum. The Defendants filed a reply to the motion on

November 14, 1996, and without oral argument the court issued its order on November 27, 1996, denying the Plaintiff's motion. Notice of appeal to the U.S. Circuit Court of Appeals for the Fourth Circuit was filed on December 20, 1996. The Court of Appeals affirmed the District Court with an unpublished opinion on March 16, 1998 and denied Petitioner's request for rehearing on June 29, 1998.

Summary of the Evidence

1. The Totality of the Circumstances. Petitioner's verified complaint alleged that on February 5, 1994, he and his wife were asleep in their cabin located in the Woodbury Rod and Gun Club, an established hunting club in Marion County, South Carolina of which Petitioner was a member. This club is contained within a private compound and is comprised of more than eighty-five (85) members, including both local business persons and professionals.

Shortly after midnight, Petitioner was awakened by a shotgun blast from a vehicle located on the county road approximately seventy-five (75) feet from a cabin Foxworth knew to be occupied. He immediately drove to that cabin, the residence of a neighbor, R.V. Larrimore, the manager and president of the hunting club.[1] Larrimore indicated that he had heard the shot and had been watching the vehicle from his front porch for more than an hour while it cruised back and forth through the compound. Larrimore asked

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[1] Larrimore testified in his deposition that he had been associated with *Woodbury* practically all of his life. He testified that he had been operating the club for the past thirty-five (35) years, and he has known Foxworth for twenty-five years.

Foxworth to drive him to where the vehicle had headed so that he could investigate the situation.

Foxworth and Larrimore proceeded down the county road for approximately three-quarters (3/4) of a mile. They observed the vehicle, a Chevy Blazer, bogged down off the road at a location on the club's property. Foxworth drove up to the vehicle and stopped approximately twenty (20) feet from it. Both vehicles continued to burn their headlights.

Larrimore stepped out of his vehicle and walked towards the stranded Blazer. As Larrimore approached the vehicle, he [Foxworth] saw three individuals huddled down on the far side of the Blazer near the front driver's side. The door was open. One of the individuals retrieved a shotgun from the rear of the truck and pointed it at Foxworth. He [Foxworth] immediately yelled to Larrimore to get back. Foxworth retrieved his own .22 rifle from his vehicle, and fired a *warning shot in the air* as he shouted to the individuals to put the gun down. The armed, and as yet unidentified individual, then pointed the shotgun directly at Larrimore.

In his deposition, Larrimore described the situation, and the feelings he had as the gun was pointed at him:

> [t]here ain't no time to get scared at a time like that. It's time to hold your nerves and use some common sense. The big boy handed the other boy the gun and when he did, he threw that gun right across that hood and I looked right straight down that gun barrel. I didn't know whether the gun was loaded or what, but it's not a pleasant thing to look down a gun barrel . . .

Larrimore testified that Foxworth again ordered the individual to disarm or else he was going to, "put a bullet in the side of the truck." When the individual remained unresponsive with the gun pointed at Larrimore, Foxworth fired three shots into the side of the Blazer. Id.

Larrimore testified that the individual then disarmed himself and he [Larrimore] started interrogating the three individuals while Foxworth went around to the rear of the Blazer and secured the gun. Larrimore described the individuals as "boys" who were, "well lit up." Id. By this Larrimore meant that the youths had been drinking alcohol.

The three youths (all of whom were underage) were extremely intoxicated. (Complaint at paragraph 22). Foxworth saw that inside the Blazer there were two coolers: one containing two quart bottles of beer and three silver cans of beer, and one containing a bottle of wine. He saw three empty beer cans on the floor of the vehicle and one open beer can was in the beverage holder on the driver's side, partially empty. Id. (Paragraph 27).

Larrimore scolded the boys and ordered them out of the area. As he and Foxworth returned to their respective cabins, they agreed to report the incident to the Sheriff's office the following morning. However, at approximately 4:00 a.m., two Marion County Sheriff's deputies arrived at Foxworth's cabin and he was asked to follow them back to the Sheriff's office. After doing so, and waiting there until approximately 11:30 a.m., Respondent, Turbeville, served four arrest warrants on Foxworth. The warrants charged him with pointing a firearm, malicious injury to personal property, and two counts of assault and battery.

The warrants made no mention that Foxworth had acted in defense of Larrimore while the "victims" held a shotgun on Larrimore, that the "victims" were trespassing and drunk, or that the "victims" were related to, or were family members of, the arresting officers. Consequently, the magistrate could not have evaluated Petitioner's conduct *under the totality of the circumstances.*

2. What the Officers Knew. Prior to the arrest, both Foxworth and Larrimore attempted to explain to the Sheriff's deputies what had happened which led up to the shooting of the vehicle. Respondent, Turbeville admitted that Foxworth had told him the youths were intoxicated ***before*** he arrested Foxworth. Turbeville depo. Tr. 44. Likewise, Larrimore had explained to Turbeville that one of the youths had pointed a gun on him and that he [Larrimore] could have gotten killed.

Further, at Plaintiff's insistence, Turbeville accompanied him back to the location where the Blazer was bogged down. Upon arriving there, however, and upon finding a full open can of beer, Turbeville picked it up, wiped off the prints, poured the contents out, crushed the can, and threw it onto the ground. Complaint at paragraph 37. Contrary to this allegation, Turbeville, testified at his deposition that he took the can back to his office and checked for prints. When he found none, he threw the can away. Turbeville Depo. Tr. 48. Larrimore corroborated Foxworth's eye witness testimony that Turbeville disposed of the beer found at the scene where the Blazer had bogged down.

3. Family Relationships. One of the three youths involved in this incident is related to Respondent, Turbeville. He is the son of Turbeville's first cousin, Turbeville depo. Tr. 67, and he refers to Turbeville as, "uncle Von." Turbeville depo. Tr. 71. The Blazer vehicle being driven by

the youths that night belonged to Respondent Graham. Indeed, his stepson was driving the vehicle earlier that night.

Turbeville swore out three of the warrants against Foxworth, and Graham swore out the fourth charging him with malicious injury to his [Graham's] vehicle. And while Foxworth, possibly "could have" explained why he had shot the vehicle, Graham swore out the warrant because he wanted to force Foxworth to pay for the bullet holes.

Not one of the four warrants presented to the magistrate included any of the information which led up to the shooting of the vehicle by Foxworth, that Foxworth had been forced to defend Larrimore from the illegal and potentially deadly conduct of the "victims," or that the "victims" were related to or family members of the arresting officers.[1]

Petitioner's Argument Below

In response to the motion for summary judgment, Petitioner presented a two tier analysis. Initially, he argued that the facts outlined above should have been included in the arrest warrant affidavits. Without those facts Petitioner argued that a neutrally detached magistrate would not have been in a position to assess the question of probable cause base upon *the totality of the circumstances.*

Secondly, the question of materiality, Petitioner argued, was one which could only be resolved by the fact finder, thus rendering summary judgment inappropriate.

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[1] On the point of motivation, the Sheriff has admitted that he requested the Internal revenue Service to "check out" the Petitioner even though he had no basis in fact for such a request.

The District Court dismissed the claim stating that the Petitioner had failed to present evidence that the Respondents had not presented the above facts orally. However, *Respondents never suggested that such had been done*, and the record shows that the Court was simply wrong on this point. Turbeville's deposition testimony establishes that he did not inform the magistrate of Foxworth's statements because he did not deem the information to be relevant.

The District Court also held that even if an omission occurred, it was not material, although the Court did not address the issue of whether materiality was a question to be resolved by the finder of fact. Lastly, the Court argued that Foxworth, "... has submitted no specific evidence establishing that he claimed the armed youth pointed a firearm at him prior to Turbeville's' securing the warrants..." However, Turbeville acknowledged that Petitioner ***had told him about the gun*** before the warrants were obtained.

> Q. Summarize for me, as best you can, what he had told you had happened in those early morning hours that resulted in firing those shots in the vehicle.
>
> A. *He had heard shots down the road at the hunting club and he had went down, along with Mr. Larrimore, and saw this vehicle parked across--back off the road. He got out with his gun. He saw the individuals and he saw that one of them had a gun. He shot into the vehicle and searched the boys and searched the vehicle, and found out who they were and what they were up to and he let*

them go. He thought at the time that they were night hunting

This testimony from Turbeville, combined with Petitioner's claim that he did inform Turbeville, establishes a reasonable inference that Turbeville was so informed, contrary to the Court's statement.

The Court of Appeals held that even if Foxworth's allegations had been made known to the magistrate before the warrants were issued, that such would not have precluded the finding that probable cause existed. Slip Op. at page 4. The District Court was affirmed and Petitioner's petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

Petitioner asserts that his rights under the Fourth Amendment were ***intentionally*** violated by arresting officers who attempted to charge him with criminal conduct in order to cover up illegal conduct committed by family members of the arresting officers. In order to accomplish the cover up, the officers provided only limited information in the arrest warrant affidavits which presented an incomplete and misleading picture of the total circumstances surrounding Petitioner's conduct. ***Both of the lower courts have decided a federal question that has not been but should be decided by this Court and in a way that conflicts with relevant decisions of this Court.***

Probable Cause

The Fourth Amendment states, in part, ***"no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . ."*** Whether probable cause exists for the

issuance of an arrest warrant is a determination which must be made by someone other than the arresting officers. *Gerstein v. Pugh, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed 2d 54 (1974).*

This Court has stated that probable cause standard has been met upon facts and circumstances such as to warrant a man of reasonable prudence and caution in believing that the offense has been committed and that the person to be arrested was the offender. *United States v. Watson, 423 U.S. 411, 96 S.Ct. 820 (1976).* This evaluation must be made in light of the totality of the circumstances with a view toward the *probability* rather than the *certainty* of criminal conduct. *United States v. Sokolow, 490 U.S. 1,109 S.Ct. 1581, 104 L.Ed. 2d 1 (1989); Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed. 2d 527 (1983).*

However, there is an obvious assumption that the information provided to that authority will be truthful, at least in the sense that facts recited by the affiant are believed or appropriately accepted by that witness as true. *Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Franks v. Delaware* put to rest the issue of whether one could go behind the assertions contained within a warrant and challenge the veracity of those allegations and it is now clear that probable cause can not stand upon allegations which contain known false or misleading statements.

Both of the lower courts have failed to apply this Court's Fourth Amendment decisional law to the facts of Petitioner's case. The arresting officers in this instance, knew that this Petitioner was reacting to a perilous situation which was of the making of their teenage relatives of the arresting officers. They were aware that these teenagers

caused both Larrimore and the Petitioner to get out of bed late at night, leave their cabins, and at minimum, investigate.

Appellant's claim under the Fourth Amendment requires that he show that he was arrested without probable cause. *Graham v. Connor, 490 U.S. 386,395, 109 S.Ct. 1865,1871, 104 L.Ed.2d 443 (1989); County of Sacramento v. Lewis, ___ U.S. ___, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998), quoting United States v. Lanier, 520 U.S. 259, at note 7, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997).* When viewed against the back drop of the totality of the circumstances in this case, it can be seen that false and misleading affidavits were submitted by the arresting officers. They were false because they intentionally omitted material facts that were relevant to a probable cause determination.

The Impact of a False Affidavit

When an arresting officer provides false information to the Magistrate when seeking an arrest warrant, such conduct violates the Fourth and Fourteenth amendments to the United States Constitution. Franks v. Delaware, supra.

In *Franks*, there was a challenge to the truthfulness of certain factual allegations made in the police affidavit which supported an arrest warrant directed at Franks. However, he was denied the opportunity to make a preliminary showing regarding the untruthfulness of those statements. In reversing that decision, this Court stated

> we hold that, where the Defendant makes a substantial...showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the

> affiant in the warrant affidavit, and if [it] is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the Defendant's request.

438 U.S. at 155, 98 S.Ct. at 2676. *Franks* provides that at such a hearing the accused has the burden of proof by a preponderance of the evidence. However, if the defendant prevails at that hearing, and the remaining content of the affidavit fails to establish the existence of probable cause, the warrant must be voided. Id.

FRANKS IN A SECTION 1983 SETTING

This rule applies to actions brought pursuant to 42 U.S.C. section 1983. See e.g. Wilkes v. Young, 28 F.3d. 1362 (4th Cir. 1994). Wilkes v. Young, supra, presented a 1983 plaintiff who alleged false and misleading statements were included in her arrest warrant.

In reversing a jury verdict for the plaintiff, the Court noted that a false or misleading statement in an arrest warrant affidavit did not constitute a violation of the Fourth Amendment, "unless the statement is necessary to the finding of probable cause." 28 F.3d at 1365. The court went on to hold that probable cause did exist in that case even with the false or misleading statements extricated from the affidavit.

Such is not the case here, we submit. Under the facts of this case, when Foxworth was awakened by the sounds of a gunshot in those early morning hours, and was then forced to fire shots into the side of the vehicle to disarm the intoxicated youths, we submit that such would not warrant

the belief of a prudent person that Foxworth was committing an offense.[2]

The omission of material facts from an arrest warrant affidavit likewise violates the holding in Franks v. Delaware, supra. United States v. Knapp, 1 F.3d 1026, (10th Cir. 1993).

In the *Knapp* decision, the Tenth Circuit held that it violates the Fourth Amendment to knowingly or recklessly omit information from a search warrant which would have vitiated probable cause. In such a situation, even the affiant's good faith does not excuse a reckless omission of material evidence from the search warrant affidavit. United States v. Jacobs, 986 F.2d 1231(8th Cir. 1993); United States v. Sherrell, 979 F.2d 1315 (8th Cir. 1992).

MATERIALITY: A QUESTION OF FACT

While, initially, the determination of relevancy of the omitted facts is a question of law, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed. 2d 202 (1986), what weight a neutral magistrate would likely have placed upon the omitted evidence is a question for the jury. Velardi v. Walsh, 40 F.3d 569, (2nd Cir. 1994); T.S.C. Industries, Inc. v. Northway, 426 U.S. 438, 450, 96 S.Ct. 2126, 2132-33, 48 L.Ed 2d 757 (1976).

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[2] For example, to find "malice" the magistrate would have to conclude that Foxworth acted with a wicked or depraved spirit intent on doing wrong, **"excluding a just cause or excuse."** State v. Fuller, 229 S.C. 439, 93 S.E. 2d 463 (1956). Under South Carolina law, malicious injury to property requires proof of malice. State v. Lewellyn, 281 S.C. 199, 314 S.E.2d 326 (1984).

With regard to the question of summary judgment and omitted facts from the affidavit, the Second Circuit has stated

> the weight that a neutral magistrate would likely have given such information is a question for the finder of fact, so that summary judgment is inappropriate in doubtful cases.

40 F.3d at 574. In the instant case, Petitioner submits that when given all of the information concerning this encounter, a question of doubt arises as to the existence of probable cause. It is for that reason that summary judgment in this case was inappropriate and wrongfully granted.

CONCLUSION

The arresting officers failed to provide the magistrate with all of the information available to them at the time they sought warrants for Petitioner's arrest. They neglected to inform the magistrate that Petitioner was acting in the defense of another, that family members of the Deputy Sheriffs were commiting illegal acts which evoked the Petitioner's response. Both of the lower courts misapplied this Court's decisional law. Summary judgment should not have been awarded and the Petitioner requests that the writ be granted.

Respectfully submitted,

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APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

CARL FOXWORTH,
Plaintiff-Appellant,

v.

BUD RICHARDSON, Marion County Sheriff, in his individual capacity; JIM GRAHAM, Marion County Deputy Sheriff, in his individual capacity; VON TURBEVILLE, Marion County Deputy Sheriff, in his individual capacity,
Defendants-Appellees.

No. 97-1001

Appeal from the United States District Court
for the District of South Carolina, at Florence.
William B. Traxler, Jr., District Judge.
(CA-95-3770-4-21)

Submitted: January 30, 1998

Decided: March 16, 1998

Before ERVIN and MOTZ, Circuit Judges, and
BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

William I. Diggs, Myrtle Beach, South Carolina, for Appellant. L. Hunter Limbaugh, WILLCOX, MCLEOD, BUYCK & WILLIAMS, P.A., Florence, South Carolina, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

In this case, the district court found as undisputed material facts that Carl Foxworth accosted three individuals, blocked their escape, fired three shots into the sports utility vehicle they were driving, and directed them to lie on the ground. After they complied, Foxworth discharged his weapon into the ground near one of the individuals and kicked two of them. After he was arrested for his role in this incident, Foxworth sued. Foxworth claims in his civil action under 42 U.S.C. § 1983 (1994), that the Marion County Sheriff and two of his deputies violated Foxworth's constitutional rights as a result of his arrest. The district court granted summary judgment in favor of the Sheriff and his deputies. Because we agree that the arrest was supported by probable cause, and find no merit to Foxworth's claim that the Sheriff intentionally omitted material facts in seeking an arrest warrant, we affirm.

Foxworth's suit is premised on his allegation that he was arrested without probable cause. *See Taylor v. Waters*, 81 F.3d 429, 434 (4th Cir. 1996). Probable cause is defined as the "'facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person . . . in believing . . . that the suspect has committed, is committing, or is about to commit an offense.'" *United States v. Williams*, 10 F.3d 1070, 1073-74 (4th Cir. 1993) (quoting *Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979)). In determining the existence of probable cause, courts examine the totality of the circumstances known to the arresting officer when the arrest is executed. *See United States v. Al-Talib*, 55 F.3d 923, 931 (4th Cir. 1995). Foxworth does not contest that the circumstances noted above, reported to the deputy sheriffs by the individuals Foxworth accosted and assaulted, would inexorably lead the Appellees to the conclusion that Foxworth had committed several offenses. Rather, his contention on appeal is that the deputies, in relaying this information to the magistrate to obtain several arrest

warrants, intentionally omitted material facts relevant to the probable cause determination.

A false or misleading statement in an affidavit used to obtain an arrest warrant will result in a violation of the Fourth Amendment only if "the statement is 'necessary to the finding of probable cause.'" *Wilkes v. Young*, 28 F.3d 1362, 1365 (4th Cir. 1994) (quoting *Franks v. Delaware*, 438 U.S. 154, 156 (1978)). Moreover, there must be a substantial showing that the warrant affiant deliberately misled the magistrate. *See United States v. Jeffus*, 22 F.3d 554, 558 (4th Cir. 1994). On appeal, Foxworth contends that the deputies failed to inform the magistrate of potentially exculpatory information. Presumably, Foxworth believes that the deputies did not include in their application for the arrest warrants Foxworth's assertions that the individuals were trespassing, intoxicated and armed with a shotgun.[1] Foxworth also suggests that the magistrate was not permitted to take into account that one of the individuals that Foxworth detained was the son of the first cousin of one of the deputies and the damaged truck belonged to the other deputy.

Notwithstanding these insinuations, Foxworth failed to present any evidence of precisely what the applications for the arrest warrant omitted. Nothing in the record before this court or the district court provides any evidence of what the deputies included or failed to include in their application before the magistrate judge. In his brief, Foxworth claims that he was "rousted from his bed" and "forced to fire shots into the side of the vehicle to disarm the intoxicated youths." Appellant's Br. at 13. According to Foxworth, if those facts had been presented to the magistrate, the circumstances "would not warrant the belief of a prudent person that Foxworth was committing an offense." *Id.* We disagree.[2] The specific facts of the situation may

[1]Foxworth alleged that the individual with the shotgun pointed the weapon at Foxworth's companion. Although this contention is supported by the deposition testimony of the companion, there is no evidence of record that the Appellees were apprised of this information before obtaining the arrest warrants. The deposition testimony of one of the Appellees that Foxworth only volunteered this information after being informed he would be charged with criminal conduct is uncontroverted in the record.

[2]Foxworth suggests that it is remarkable that he did not kill anyone. While we agree that it was fortunate that no one was seriously injured,

have led Foxworth to believe that he was *justified* in detaining the three individuals, discharging his weapon numerous times, damaging the truck and physically assaulting two of the individuals, but there can be no question that he was also committing numerous offenses. Even assuming the Appellees withheld the additional information, as Foxworth suggests, the inclusion of that information would not have precluded the magistrate's finding that probable cause existed. *See Wilkes*, 28 F.3d at 1365. The district court did not err in its determination.

Accordingly, we affirm the district court's order granting summary judgment in favor of the Appellees. In light of our conclusion with respect to the existence of probable cause, we find no need to address Foxworth's arguments regarding the Appellees' qualified immunity. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

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the fact that there was not a fatality does not lead us to the conclusion that there was no probable cause for an arrest. Counsel's suggestion to the contrary is alarming.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
June 29, 1998

No. 97-1001
CA-95-3770-4-21

CARL FOXWORTH
Plaintiff - Appellant

v.

BUD RICHARDSON, Marion County Sheriff, in his individual capacity; JIM GRAHAM, Marion County Deputy Sheriff, in his individual capacity; VON TURBEVILLE, Marion County Deputy Sheriff, in his individual capacity
Defendants - Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,
/s/ Patricia S. Connor
CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

FLORENCE DIVISION

Carl Foxworth,

C/A No. 4:95-3770-21

Plaintiff,

v.

O-R-D-E-R

Marion County Sheriff Bud Richardson, in his individual capacity; Marion County Deputy Sheriff Jim Graham, in his individual capacity; and Marion County Deputy Sheriff Von Turbeville, in his individual capacity,

Defendants.

* *

Plaintiff Carl Foxworth ("Foxworth") contends that he was improperly arrested by Defendants Bud Richardson, Jim Graham ("Graham"), and Von Turbeville ("Turbeville") (collectively, "Defendants") because the affidavit securing the warrant for his arrest omitted material

facts that, in Foxworth's opinion, tended to exculpate him. Accordingly, Foxworth asserts a claim pursuant to 42 U. S. C. A. § 1983, contending that his arrest violated the Fourth Amendment. Additionally, Foxworth asserts related state-law claims. Pursuant to Federal Rule of Civil Procedure 56 (c), the Defendants move for summary judgment, asserting that there are no disputes respecting the material facts and they are entitled to judgment as a matter of law. Concluding that Foxworth's arrest was based on probable [case] sic even considering the challenged omissions and alternatively that the Defendants are entitled to qualified immunity, the court grants their motion for summary judgment.

I.

The material facts as established by the evidence submitted by the parties in relation to the motion are not disputed. Late one evening, R. V. Larimore ("Larimore"), a hunting club's caretaker, heard a firearm discharge and decided to investigate. According to Larimore, as he exited his residence, Foxworth met him, and the two men decided

to investigate jointly the shooting. Eventually, Larimore and Foxworth confronted three Youths ("Youths"), whose vehicle was bogged down in a quagmire situated on the hunting ground. According to the statements made by the Youths and the undisputed deposition testimony of Graham, Foxworth incorrectly concluded that the Youths were responsible for vehicle thefts that had occurred at an earlier, unspecified date. Believing the Youths to be responsible for the thefts and seeing that one of the Youths was armed, Foxworth blocked the Youths' path with his automobile, successfully ordered the armed youth to drop his firearm, ordered them out of the car at gunpoint, and directed them to lie spread-eagle on the ground. While prostrate on the ground, Foxworth fired "warning" shots near the head of one of the Youths, kicked two of them, and repeatedly discharged his firearm into the Youths' vehicle, riddling it with holes. Foxworth accused the Youths of consuming alcohol and searched the vehicle for alcohol and marijuana. Foxworth then advised the Youths that he had made a mistake, and the Youths should forget the incident.

Frightened, the Youths proceeded to Sheriff's Headquarters, [1] where, after being separated, they made oral and written statements concerning their confrontation with Foxworth. According to the Youths' oral and written statements, Foxworth had threatened them with a firearm, ordered them out of the vehicle, accused them of consuming alcohol, and searched and damaged the vehicle. On hearing that Foxworth accused the Youths of consuming alcohol, Graham checked, but smelled no alcohol on their breaths. Foxworth was eventually escorted to Sheriff's Headquarters by other deputies, and according to Turbeville, the officer assigned to investigate the case, Foxworth informed him that he believed the Youths were night hunting, had seen one youth with a firearm, stopped the Youths, and searched and repeatedly discharged his firearm into their vehicle. Concluding that he had probable cause to arrest Foxworth, Turbeville procured arrest warrants from a state magistrate for pointing a firearm and

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[1] Unlike the Youths who promptly reported the confrontation to law enforcement agents, Foxworth apparently returned to his lodgings.

two counts of assault and battery. Because Graham owned the vehicle driven by the Youths that Foxworth damaged, Graham secured an arrest warrant for malicious injury to personalty, which was based on Foxworth's own admissions.

According to Turbeville, on being advised that he was under arrest, Foxworth amended his rendition of events, stating that the armed youth pointed the firearm at Larimore. In fact, when repeatedly questioned at his deposition, Turbeville consistently and adamantly explained that Foxworth did not aver that one of the Youths pointed a firearm at Larimore until after Turbeville advised Foxworth that Foxworth was being charged. Likewise, Turbeville testified that while Larimore initially stated he had seen one of the Youths with a firearm, Larimore had stated the firearm was not pointed at him. Additionally, Turbeville testified in his deposition that only after he charged Foxworth, did Foxworth assert that he feared for his life.

Following Foxworth's arrest, a state magistrate found that probable cause for arrest existed after holding a preliminary hearing. The case was then presented to the

county grand jury, which, likewise finding probable cause, issued an indictment. Eventually, the charges against Foxworth were dismissed at the instance of the prosecutor because Foxworth made restitution for damage to the vehicle.[2]

As Graham testified in his deposition, Foxworth threatened him with a civil suit because he had been arrested. Making good on his threat, Foxworth instituted this suit, alleging a Fourth Amendment violation pursuant to 42 U.S.C.A. § 1983. Additionally, Foxworth

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[2] After Foxworth's arrest, Turbeville inspected the scene of the confrontation and found a beer can, which Foxworth insisted that Turbeville dust for fingerprints. Accepting Foxworth's contention, exclusively for purposes of summary judgment, that Turbeville destroyed the beer can on finding it, such a contention is of no moment. First, because the beer can was discovered subsequent to Foxworth's arrest, the issue of the beer can did not enter the probable cause calculus. Second, the beer can is of no relevence because the most that the beer can would demonstrate is that one of the Youths had handled it, and the Youths' presence at the scene is not disputed. The court, therefore, attributes no relevance to this issue.

brought pendant state-law claims of: (1) abuse of process; (2) malicious prosecution; (3) conspiracy; and (4) slander.

Respecting his Fourth Amendment claim, Foxworth posits that the warrants' affidavits omitted material information that misled the issuing magistrate. According to Foxworth, in securing the warrants, Turbeville and Graham omitted the following material facts: (1) The Youths were inebriated, yet not of legal drinking age; (2) The Youths were driving erratically on the grounds and harassing other grounds patrons; (3) The vehicle driven by the Youths belonged to Graham; (4) One of the youths was related to Graham and one was related to Turbeville; and (5) One of the Youths had first pointed a firearm at Foxworth and Larimore causing them to fear for their lives. Positing further, Foxworth contends that there was not probable cause to arrest him and thus the warrants violated the Fourth Amendment.[3]

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[3] To support their positions, the Defendants submitted the following evidence: (1) the complete depositions of Turbeville and Graham; (2) the arrest warrants; and (3) the written statements of all three Youths. Foxworth submitted: (1) pages 4, 8-11, 13, 15-16, 28, 49, and 51 of Larimore's

II.

Federal Rule of Civil Procedure 56 (c) requires that the district court enter judgment against a party who, "after adequate time for . . . discovery [,] fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U. S. 317, 322 (1986). To prevail on its motion for summary judgment, the Defendants must demonstrate that: (1) there is no genuine issue as to any material fact; and (2) they are entitled to judgment as a matter of law. See Anderson v. Liberty Lobby, Inc., 477 U. S. 242, 248-52 (1986). In determining if a genuine issue of material fact has been raised, the court must construe all facts and reasonable inferences in favor of Foxworth. See id. at 255. If, however,

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deposition; (2) pages 13, 15, 68, and 71 of Turbeville's deposition; (3) pages 22-23 of Graham's deposition; (4) page 18 of Jimmy Owens's deposition, father of one of the Youths; (5) page 70 of his deposition; and (6) pages 21-22 of Bud Richardson's deposition.

"the evidence is so one-sided that one party must prevail as a matter of law," the court must grant summary judgment in that party's favor. Id. at 252. Foxworth " 'cannot create a genuine issue of fact through mere speculation or the building of one inference upon another.' " See Harleysville Mut. Ins. Co. v. Packer, 60 F. 3d 1116, 1120 (4th Cir. 1995) (quoting Beale v. Hardy, 769 F. 2d 213, 214 (4th Cir. 1985)). To survive the Defendants' motion for summary judgment, Foxworth may not rest on his pleadings, but must establish that specific, material facts exist that give rise to a genuine issue. See Celotex Corp., 477 U. S. at 324. In satisfying this burden, the Anderson Court explained, "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." Anderson, 477 U. S. at 252. In this regard, "[s] ummary judgment serves the useful purpose of disposing of meretricious, pretended claims before the court and parties become 'entrenched in a frivolous and costly trial.' " Myrtle Beach Pipeline Corp. v. Emerson Elec. Co., 843 F. Supp. 1027, 1035 (D. S. C. 1993) (quoting Donahue v. Windsor

Locks Bd. of Fire Comm'rs, 834 F. 2d 54, 58 (2d Cir. 1987)), aff'd, 46 F. 3d 1125 (4th Cir. 1995) (unpublished) (per curiam) (affirming summarily the reasoning of the district court). Guided by this procedural standard, the court first examines the issue of probable cause to determine if Foxworth's arrest violated the Fourth Amendment and then address the issue qualified immunity.

A.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Thus, by the express language of the Constitution, Foxworth has a right not be arrested without probable cause. An arrest based on probable cause, however, does not violate the Fourth Amendment. See Hill v. California, 401 U. S.

797, 802-03 (1971) (holding that there is no Fourth Amendment violation if law enforcement agents arrested an improper suspect if the arrest was based on probable cause); Crawford v. United States, 160 F. 2d 629, 630 (4th Cir. 1947) (per curiam) (holding that an arrest is lawful if law enforcement agents reasonably concluded that the defendant committed a crime). For purposes of the Fourth Amendment, probable cause exists if "at the moment the facts and circumstances within [law enforcement agents'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [defendant] had committed or was committing an offense." See Beck v. Ohio, 379 U. S. 89, 91 (1964). Probable cause, therefore, is established based on the "totality of the circumstances." See Illinois v. Gates, 462 U. S. 213, 230-31 (1983) (examining contours of probable cause in connection with a search warrant); United States v. Colkley, 899 F. 2d 297, 301-02 (4th Cir. 1990) (applying the Gates totality-of-the-circumstances standard in connection with an affidavit securing an arrest warrant). In examining the facts and circumstances shaping the probable cause

inquiry, only those facts and circumstances known at the time of the arrest may be considered. See Henry v. United States, 361 U. S. 98, 103 (1959). Amalgamating these precepts, the crucial inquiry respecting probable cause is "the suspect's conduct as known to the officer, and the contours of the offense thought to be committed by that conduct." See United States v. Jones, 31 F. 3d, 1304, 1312 (4th Cir. 1994) (quoting Pritchett v. Alford, 973 F. 2d 307, 314 (4th Cir. 1992)). As a fact-bound inquiry, probable cause does not lend itself to ironclad rules, but is governed by "practical, nontechnical" considerations, see Beck, 379 U. S. at 91, and in this respect, probable cause effectuates " 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act,' " Hill, 401 U. S. at 804-05 (quoting Brinegar v. United States, 338 U. S. 160, 175 (1949)). As its name implies, therefore, probable cause exemplifies "sufficient probability, not certainty." Id. at 804; see also Jones, 31 F. 3d at 1312 (observing that "[p] robable cause is, at best, a nebulous concept"). Because probable cause does not demand certainty, it may be based on evidence that would be

inadmissible in a criminal trial. See United States v. Ventresca, 380 U. S. 102, 108 (1965) (stating that an affidavit securing a warrant may contain hearsay statements for purposes of probable cause). In expounding on the difference between probable cause and admissible evidence for purposes of a criminal prosecution, the Brinegar Court explained that "[t]here is a large difference between the two things to be proved [guilt and probable cause], as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof required to establish them." Brinegar, 338 U. S. at 173 (examining probable cause in connection with an arrest and search). If probable cause mandated a greater quantum of evidence, it would "unduly hamper law enforcement." Id. at 176. In examining an affidavit securing a warrant based on probable cause, "[g]reat deference is to be given a magistrate's assessment of the facts when making a determination of probable cause." United States v. Williams, 974 F. 2d 480, 481 (4th Cir. 1992). To fulfill this great deference, a review of the warrant must not be "grudging or negative," thereby "discourag [ing] police officers from submitting their

evidence to a judicial officer before action." Ventresca, 380 U. S. at 108.

Application of these principles compels the conclusion that Foxworth's arrest was effected with probable cause and thus did not violate the Fourth Amendment. Here, Turbeville's decision to arrest Foxworth was made after the Youths had made their oral and written statements to the Defendants and following Foxworth's admission that he discharged his firearm into the vehicle. Hence, there were statements from the victims and the perpetrator concerning their first-hand knowledge of the criminal activity, which at least satisfied probable cause. See United States v. Lloyd, 71 F. 3d 1256, 1263 (7th Cir. 1995) (explaining that first-hand knowledge from a confidential informant establishes probable cause), cert. denied, 116 S. Ct. 2511 (1996); Singer v. Fulton County Sheriff, 63 F. 3d 110, 119 (2d Cir. 1995) (holding that if law enforcement agents receive information respecting a crime from the victim and have no reason to conclude that the victim is not reliable, probable cause is established), cert. denied, 116 S. Ct. 1676 (1996); United States v. Wylie, 705 F. 2d 1388, 1390

(4th Cir. 1984) (observing, in connection with a challenged affidavit, that first-hand knowledge of a crime establishes probable cause); United States v. Mahler, 442 F. 2d 1172, 1174-75 (9th Cir.) (finding that if the informant of a crime is also the victim, then probable cause is established absent a reason to disbelieve the informant-victim), cert. denied, 404 U. S. 993 (1971); Daniels v. United States, 393 F. 2d 359, 361 (D. C. Cir. 1968) (stating that if law enforcement agents receive information from an eye witness or a victim of criminal activity, then probable cause is established absent valid reason to disregard the eye witness or victim); see also Torchinsky v. Siwinski, 942 F. 2d 257, 262 (4th Cir. 1991) (observing that in a § 1983 context information from the victim concerning the defendant's criminal activity is the best information on which to secure an affidavit, absent observation by law enforcement agents). In addition, there was physical evidence aiding the establishment of probable cause. See United States v. Fowlie, 24 F. 3d 1059, 1067 (9th Cir. 1994) (appreciating that physical evidence can aid in establishing probable cause in connection with a search warrant), cert. denied, 115 S. Ct. 742 (1995); United States

v. Wesley, 990 F. 2d 360, 367 (8th Cir. 1993) (same). Accordingly, this evidence inexorably leads to the conclusion that there was probable cause to arrest Foxworth. Given this conclusion, Foxworth's arrest was wholly valid and thus cannot serve as a vehicle for a Fourth Amendment violation.

Despite the force of this conclusion, Foxworth contends that the Defendants willfully omitted material information from the affidavit securing his arrest warrant in alleged violation of Franks v. Delaware, 438 U. S. 154 (1978). The gravamen of Foxworth's Fourth Amendment claim, therefore, is that material, exculpatory evidence was withheld from the state magistrate. While recognizing the presumptive validity of warrants secured by a proper affidavit, see id. at 171, the Franks Court concluded that under exceptional circumstances, a defendant can challenge a facially valid affidavit entitling him to an evidentiary hearing regarding the affidavit's integrity, provided he satisfies two criteria, see id. at 155-56. First, a putative Franks defendant must establish "a substantial preliminary showing that a false statement knowingly and

intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit." Id. To satisfy this burden, the defendant must proffer more than conclusory allegations; rather, he must proffer detailed proof of the lack of veracity or reckless disregard in the affiant securing the warrant, which requires that he "point out specifically the portion of the warrant affidavit that is claimed to be false" and accompany his challenge "by a statement of supporting reasons." See id. at 171. Second, the defendant must establish that the false information was necessary to the finding of probable cause; but if the affidavit supports a finding of probable cause if purged of the challenged statements, then no violation transpires and concomitantly no evidentiary hearing is required. See Id. 171-72. If, however, the defendant succeeds in establishing a Franks violation, the warrant becomes a nullity and any evidence collected pursuant to it is inadmissible. See id. at 156. While Franks is grounded in charging positive falsehoods appearing in a warrant affidavit, the courts have concluded that Franks applies to material omissions tending to undermine the affidavit's integrity. See, e.g., Rivera v.

United States, 928 F. 2d 592, 604 (2d Cir. 1991); Colkley, 899 F. 2d at 300; United States v. Strini, 658 F. 2d 593, 597 (8th Cir. 1981).

In examining a Franks challenge, courts must remain cognizant of the fact that to serve the salutary purpose of probable cause, "affidavits . . . must be tested and interpreted by magistrates and courts in a common-sense and realistic fashion." Ventresca, 380 U. S. at 108. This practical approach to analyzing warrant affidavits recognizes that affidavits "are normally drafted by nonlawyers in the midst and haste of a criminal investigation." Id. To accommodate the realities of the warrant affidavit process into the Franks calculation, "[a]n affiant cannot be expected to include in an affidavit every piece of information gathered in the course of an investigation." Colkley, 899 F. 2d at 300. Therefore, "[t]he mere fact that the affiant did not list every conceivable conclusion does not taint the validity of the affidavit." United States v. Burnes, 816 F. 2d 1354, 1358 (9th Cir. 1987). This accommodation comports with the precept that in executing an arrest warrant, law enforcement

agents are not compelled to investigate independently every claim of innocence. See Mensh v. Dyer, 956 F. 2d 36, 40 (4th Cir. 1991) (making this observation in the context of a § 1983 suit). Reconciling these principles with Franks, the Colkley court explained that "Franks protects against omissions that are designed to mislead, or that are made in reckless disregard of whether they would mislead, the magistrate." Colkley, 899 F. 2d at 301. Were law enforcement agents compelled to draft warrant affidavits with the precision of attorneys and likewise compelled to investigate and recite every permutation of events that could have transpired, an impractical and unworkable situation would result.

Applying these principles, the Colkley court concluded that there was no Franks violation respecting Colkley's challenge of a warrant securing his arrest, even though the affidavit failed to recite that numerous eye witnesses did not identify Colkley in a photographic spread and law enforcement agents based their height description in disregard of some of the eye witnesses' testimony. See id. at 301. The Colkley court held that the omissions from

the warrant affidavit failed to meet the restrictive Franks standard because there was no evidence that law enforcement agents intentionally misled the magistrate; rather, the law enforcement agents simply concluded that the omissions were irrelevant for purposes of probable cause. See id. In reaching this holding, the court specifically noted that Franks generally applies to positive falsehoods appearing in a warrant affidavit, which was not the case in Colkley, and in this respect, the law enforcement agents conduct "fell far short of the level of flagrant police action Franks is designed to prevent." Id. In addition, Colkley observed that no inference of recklessness could be predicated on the omissions from the warrant affidavit, finding such an inference at loggerheads with Franks because it melds the separate inquiries of intentional conduct and materiality. See id. Because the law enforcement agents' conduct was not intentional, there was no Franks violation. Writing further, Colkley concluded that the omitted information was not material because it would not have altered the conclusion that probable cause existed to arrest the defendants. See id. at 301-02.

Foxworth cannot established a Franks violation. Here, Foxworth argues that there were material omissions in the affidavit that rendered it misleading, rather than contending that the affidavit contains affirmatively false declarations. First, there is no substantial showing that the warrant affiant deliberately misled the magistrate. See United States v. Jeffus, 22 F. 3d 554, 558 (4th Cir. 1994) (holding that a Franks hearing was not required to question the veracity of information contained in an affidavit because the challenge was conclusory and not supported by specific assertions of falsity or recklessness). Rather, at most, there are conclusory allegations that Turbeville failed to investigate sufficiently any alleged suspicious activities of the Youths and to consider that one youth was related Graham and one to Turbeville, as well as the fact that the vehicle belonged to Graham before seeking the warrants.[4] In this regard, Foxworth has proffered no evidence establishing that the state magistrate issuing the warrant

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[4] Foxworth's allegation that a firearm was pointed at him is discussed supra at 4.

was not orally informed of the allegedly exculpatory, but omitted, information. See United States v. Clyburn, 24 F. 3d 613, 617 (4th Cir.) (holding that a state magistrate's relying on unrecorded oral testimony in connection with issuing a search warrant presented no Fourth Amendment violation), cert. denied, 115 S. Ct. 274 (1994). Here, the record is void of evidence respecting any oral statements Turbeville or Graham made to the issuing magistrate in connection with securing the arrest warrants. While the Defendants included the warrants in the record, as well as Turbeville's testimony that he had presented to the state magistrate the evidence he possessed to establish probable cause supporting Foxworth's arrest, Foxworth failed to submit any evidence demonstrating that there was an omission in the information given to the magistrate by the Defendants in securing the warrants--anamolous indeed given that he is challenging them. Hence, there is no testimony whatsoever from the Defendants or the issuing magistrate concerning any oral statements made in connection with the warrants. Having alleged a material omission of exculpatory evidence, Foxworth shouldered the burden of proffering evidence that

would support his allegations, but he has failed this obligation. Thus, Foxworth fails the first prong of Franks because he cannot specifically prove even an omission.

Second, the alleged omissions are simply not material because they fail to undermine the conclusion that probable cause existed to arrest Foxworth. The essence of Foxworth's challenge is that the Defendants' failed to investigate fully the alleged unlawful conduct of the Youths, but law enforcement agents do not labor under a duty to investigate independently every claim of innocence in securing an arrest warrant. See Baker v. McCollan, 443 U. S. 137, 145-46 (1979) (§ 1983 claim); Mensh, 956 F. 2d at 40 (same). Regardless of the merits of this challenge, this does not detract from the fact that probable cause existed to arrest Foxworth because the victims of Foxworth's alleged crimes reported the details of the incident and there was physical evidence to bolster their statements. Foxworth's challenge, therefore, is wholly immaterial. See Colkley, 899 F. 2d at 302 (ruling that if probable cause supports the warrant affidavit if purged of the challenged falsehoods or omissions then the challenged falsehoods or omissions are

immaterial and the warrant is valid, thereby precluding a Franks hearing). Thus, even if a warrant is based in part on unlawful evidence, its inclusion does not taint the warrant if the warrant is otherwise supported by probable cause. See United States v. Smith, 730 F. 2d 1052, 1056, (6th Cir. 1984) (search warrant). The Youths' alleged misconduct, relation to Graham and Turbeville, and the fact that Graham owned the damaged vehicle does not vitiate the fact that Foxworth discharged his firearm in an effort to frighten the Youths, nor does it diminish the fact that Foxworth damaged the vehicle; and respecting Foxworth's challenge that the Defendants omitted Graham's ownership of the vehicle, Graham's ownership of the damaged vehicle is evident from the face of the warrant Graham secured. Fatally, Foxworth has defaulted on his procedural burden in attempting to establish his case; he has submitted no specific evidence establishing that he claimed the armed youth pointed a firearm at him prior to Turbeville's securing the warrants, nor has he proffered any evidence other than his own conclusory, self-serving statement that there was a near-empty beer can in the vicinity of the confrontation.

Accordingly, the court concludes that because the Defendants had probable cause to arrest Foxworth and there was no Franks violation, the Defendants are entitled to summary judgment.

B.

Having concluded that Foxworth's arrest did not offend the Fourth Amendment and that he cannot establish a Franks violation, the court will nevertheless address the issue of qualified immunity. Assuming, therefore, that Foxworth has established his claim, the court concludes that the Defendants are entitled to qualified immunity. See Torchinsky, 942 F. 2d at 260 (stating that if the case can be resolved on the basis of qualified immunity, the court is not required to address separately the issue of probable cause to arrest). The Defendants are shielded by the defense of qualified immunity provided their "actions could reasonably have been thought consistent with the rights they are alleged to have violated," see Anderson v. Creighton, 483 U. S. 635, 638 (1987). From this premise proceeds the conclusion that the Defendants are protected from liability for damages provided "their conduct does not violate clearly

established statutory or constitutional rights of which a reasonable person would have known," see Harlow v. Fitzgerald, 457 U. S. 800, 818 (1982). The applicability of the defense of qualified immunity, "generally turns on the 'objective legal reasonableness' of the action assessed in the light of the legal rules that were 'clearly established' at the time [the challenged action] was taken," Anderson, 483 U. S. at 639 (quoting Harlow, 457 U. S. at 819). Thus, in resolving the applicability of qualified immunity, "[t]he contours of the right must be sufficiently clear [so] that a reasonable official would understand that what he is doing violates that right," id. at 640. In Tarantino v. Baker, 825 F. 2d 772, 775, (4th Cir. 1987), the court explained that in analyzing the nature of whether a right is "clearly established" the focus is "not so much on the 'clarity' of the right allegedly violated as on whether the officer's actions 'clearly' infringed that right." In undertaking this analysis, "the proper focus is not upon the right at its most general or abstract level, but at the level of its application to the specific conduct being challenged," Pritchett, 973 F. 2d at 312. Consistently eschewing generality of knowledge of the

allegedly violated right, see, e.g., DiMeglio v. Haines, 45 F. 3d 790, 803 (4th Cir. 1995), the Fourth Circuit has maintained that before liability attaches to officials, the right that they have allegedly violated "must be clearly established under the particular circumstances confronting [them] at the time of the questioned action," Slattery v. Rizzo, 939 F. 2d 213, 216 (4th Cir. 1991). Thus focused, the Fourth Circuit concluded subsequently that "[o]fficials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines," Marciariello v. Sumner, 973 F. 2d 295, 298 (4th Cir. 1992), cert. denied, 506 U. S. 1080 (1993). This affords the protection of qualified immunity to officials, who, as hindsight may reveal, have made "bad guesses," Marciariello, 973 F. 2d at 298, while simultaneously excluding from its defensive embrace "the plainly incompetent or those who knowingly violate the law," Malley v. Briggs, 475 U. S. 335, 341 (1986). Amalgamating these principles, the test for determining the applicability of qualified immunity is: (1) identification of the specific right allegedly violated, which is a legal conclusion; (2) whether the right was so clearly established as to apprise a

reasonable official of its constitutional parameter, which likewise is a question of law; and (3) if the reasonable official is thus apprised, whether he could have believed his conduct was lawful, which generally entails a factual resolution. See Simmons v. Poe, 47 F. 3d 1370, 1385 (4th Cir. 1995). The Supreme Court has consistently explained that law enforcement agents are entitled to qualified immunity in connection with arrests "[e]ven [if they] . . . reasonably but mistakenly conclude that probable cause is present [.]" Hunter v. Bryant, 502 U. S. 224, 227 (1991) (per curiam). In this regard respecting warrants, "[o]nly where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable will the shield of immunity be lost." Malley, 475 U. S. at 344-45. The Fourth Circuit has noted the continued vitality of these principles, concluding that qualified immunity jurisprudence has remained stable. See DiMeglio, 45 F. 3d at 795-803.

Fourth Circuit precedent applying these precepts compels the conclusion that the Defendants are entitled to qualified immunity. In Simmons, the court addressed the

applicability of a Franks violation and qualified immunity in connection with an arrest. In Simmons, law enforcement agents considered James Simmons ("Simmons") a suspect in a rape investigation based on a psychological profile compiling many characteristics of the rapist. See Simmons, 47 F. 3d at 1374. In drafting the warrant to search Simmons's residence, law enforcement agent Vernon Poe ("Poe") selected portions of the characteristics from the psychological profile that corresponded to Simmons, recited in the affidavit that some characteristics did not correspond to Simmons, but specifically omitted four characteristics, notably race, that Simmons did not share with the rapist's profile. See id. at 1375. Simmons was eventually taken into custody, and after a blood test and confession from another suspect exonerated him, he brought, inter alia, a § 1983 claim against Poe and other law enforcement agents. See id. at 1375-76. According to Simmons, the search warrant failed to establish probable cause because the warrant affidavit omitted material information, specifically Simmons's race, he was entitled to a Franks hearing.

The Fourth Circuit rejected Simmons's contentions, ruling that the affidavit securing the search warrant established probable cause, there was no Franks violation, and Poe was entitled to qualified immunity. First, the court explained that in applying a highly deferential standard of review regarding a magistrate's finding of probable cause, the warrant affidavit did not violate the Fourth Amendment, despite any impropriety, because it independently established probable cause. See 1378-80.

Second, in addressing the alleged Franks violation, the court explained that Franks is "very strictly" construed, noting that "Franks hearings are not required unless an omission from a warrant affidavit is the product of a deliberate falsehood or done in reckless disregard of the truth." Id. at 1383. Simmons failed to meet the Franks criteria: One, the omissions of the characteristics that Simmons did not share with the rapist's profile, notably race, were not intentional because the characteristics that were included were consistent with Simmons and the victim's testimony relating to these characteristics was tenuous; moreover, Simmons's allegations of reckless were

conclusory and unsupported. See id. at 1384. Two, the omissions were not material because they were not necessary to a finding of probable cause and the other characteristics sufficiently corresponded to Simmons. See id.

Third, the court concluded that Poe was entitled to qualified immunity because whether there was a constitutional violation was uncertain, given that the warrant was valid. See id. at 1385. In addition, even if there were a violation, it was not clearly established "law that it is unconstitutional for a profile to include race, along with other factors, to be included in a warrant application." See id. at 1385-86.

Similarly in Torchinsky, Bill Bull ("Bull") was apparently assaulted by an unknown assailant at his home and subsequently transported to a local hospital. See Torchinsky, 942 F. 2d at 259. Deputy E. L. Siwinski ("Siwinski") interviewed Bull, who stated and confirmed that William Torchinsky ("Torchinsky") had assaulted him. See id. at 259-60. Because Bull had earlier given a differing account of his assault, Siwinski reinterviewed Bull, who

again stated that Torchinsky and Torchinsky's wife had assaulted him. See id. After conferring with his superior as to whether probable cause existed to arrest the Torchinskys, Siwinski presented his information to a state magistrate, who issued an arrest warrant for the Torchinskys. See id. at 260. Subsequent to the Torchinskys' arrest, Bull stated that the Torchinskys did not assault him; consequently, the Torchinskys brought a claim against Siwinski pursuant to 42 U. S. C. A. § 1983. See id.

On appeal, the Fourth Circuit affirmed the district court's grant of summary judgment in favor of Siwinski. First, the court reasoned that the Torchinskys' arrest was supported by probable cause because the application securing the warrant explained that the victim had at least twice implicated the Torchinskys, his prior differing account notwithstanding. See id. at 261-62. In reaching this conclusion, the court observed that two state magistrates had independently concluded that probable cause existed strongly counselled in favor of finding probable cause. Moreover, the court rejected the Torchinskys' contention that Siwinski omitted relevant information from the warrant

application because Siwinski testified in his deposition that he had presented all information to the magistrate. See id. at 262.

Second, in eschewing the Torchinskys' assertion that Siwinski failed to investigate adequately Bull's account of the assault, the court specifically concluded that Bull implicated the Torchinskys, and under such circumstances, "it is difficult to imagine how a police officer could obtain better evidence of probable cause than an identification by name . . . provided by a victim [.]" See id. In so reasoning, the court opined that Siwinski acted reasonably in securing a warrant, the Torchinskys' protestations to the contrary that Bull had sustained head injuries and given different accounts of his assault notwithstanding. Regarding the head injuries, the court explained that Bull was perfectly lucid during his interviews, as hospital personnel opined and Siwinski's test confirmed. Respecting the differing accounts of the assault, the court stated that Bull's implicating the Torchinskys was the best-reasoned account of the assault, particularly given the urgent nature of criminal investigations. See id. at 263.

Third, the court ruled that Siwinski was entitled to qualified immunity even though he did not interview the Torchinskys prior to arresting them. The court premised this ruling on two grounds. One, compelling law enforcement agents to interview a suspect prior to arrest may defeat the purpose of a criminal investigation because if the suspect is interviewed, he may destroy evidence of his criminal activity or flee the long arm of the law. Furthermore, such a requirement is discretionary and necessarily rests with law enforcement agents, not federal judges. See id. at 263-64. Two, such a rule conflicts with Baker because law enforcement agents are not constrained to "exhaust every potentially exculpatory lead or resolve every doubt about a suspect's guilt before probable cause is established." Id. at 264.

Application of these precepts leads to the irresistible conclusion that the Defendants are entitled to summary judgment on the grounds of qualified immunity. Here, as explained, the Defendants had probable cause to arrest Foxworth: The victims made oral and written statements detailing Foxworth's conduct, and Foxworth admitted

discharging his firearm into the vehicle. Thus, victims' statements, an admission from the perpetrator, and the corroborating physical evidence combined to create probable cause, thereby triggering a successful qualified immunity defense. See Taylor v. Meacham, 82 F. 3d 1556, 1561-63 (10th Cir. 1996) (concluding that even though false information was included in the warrant securing the arrest and information was omitted from the affidavit securing the arrest, the defendants were entitled to summary judgment because probable cause was established by other uncontested facts). Buttressing this conclusion, two state magistrates--the magistrate issuing the warrants and another magistrate that presided at the preliminary hearing--independently concluded that probable cause supported the arrest, see Torchinsky, 942 F. 2d at 262 (noting the import of state magistrates independently concluding that probable cause existed to support an arrest warrant), as did the grand jury. Foxworth's subsequent exoneration does not retroactively vitiate probable cause because "probable cause does not require an officer to be certain that subsequent prosecution of the arrestee will be

successful," Krause v. Bennett, 887 F. 2d 362, 371 (2d Cir. 1989). Therefore, the Defendants are entitled to qualified immunity.

III.

In addition to his §1983 claim, Foxworth raises a host of other state-law claim, but precedent counsels against entertaining them. See, e.g., Carnegie-Mellon Univ. v. Cohill, 484 U. S. 343, 350 (1988) (instructing federal courts to decline to exercise pendant jurisdiction if the federal claims have been disposed of relatively early in the litigation); Lennon v. Miller, 66 F. 3d 416, 426 (2d Cir. 1995) (dismissing the plaintiff's state law claims because the court of appeals reversed the district court's holding that the defendants were not entitled to qualified immunity on plaintiff's § 1983 claims for false arrest and malicious prosecution); Eubanks v. Gerwin, 40 F. 3d 1157, 1161-62 (11th Cir. 1994) (declining to exercise pendant jurisdiction over state law claims because the § 1983 claims of false arrest and malicious prosecution were meritless); Torchinsky, 942 F. 2d at 264 (affirming dismissal of the state claims because the defendant was entitled to summary

judgment on the basis of qualified immunity respecting the § 1983 claim). Accordingly, the court declines to entertain Foxworth's state-law claims and dismisses them without prejudice.

IV.

Because probable cause existed to arrest Foxworth, there is no Fourth Amendment violation, and furthermore, Foxworth failed to establish a Franks violation. Likewise, the Defendants are entitled to summary judgment on the basis of qualified immunity. Given these conclusions, the Defendants are entitled to summary judgment on the actions premised on § 1983, and thus their motion is granted as to that claim.[5] Regarding Foxworth's state-law claims, they are dismissed without prejudice.

IT IS SO ORDERED.

S/ William B. Traxler, Jr.
WILLIAM B. TRAXLER, JR.

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[5] The court in this order has not discussed Defendant Marion County Sheriff Bud Richardson because no evidence has been presented to show any liability on his part with regard to the § 1983 claim.

UNITED STATES DISTRICT JUDGE

October 23, 1996
Florence, South Carolina